No. 309 (30)

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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

October Term, 1943

WERNER VON CLEMM,

Petitioner,

—*against*—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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Law Brief Press—NYC

SUBJECT INDEX

	PAGE
Table of Authorities	i
Petition for Writ of Certiorari	1
Statement of the Matter Involved	1
Reasons Relied on For Allowance of the Writ	4
Prayer for Writ	5
Brief in Support of Petition for Writ	7
Opinion of the Court Below	7
Jurisdiction	7
Specification of Errors	7
Argument	8
Appendix 1 (Section 95a, Title 12 U. S. C. A.)	13
Appendix 2 (Executive Order No. 8405)	14

TABLE OF AUTHORITIES

Cases Cited:

British American Tobacco Co. v. Federal Reserve Bank, 104 F. (2d) 652, certiorari denied 308 U. S. 600	10
Campbell v. Chase National Bank, 5 Fed. Supp. 156, affirmed 71 F. (2d) 669, certiorari denied 293 U. S. 592	9
Panama Refining Co. v. Ryan, 293 U. S. 388	6, 8
Perry v. U. S., 294 U. S. 330	9
Schechter v. U. S., 295 U. S. 495	6, 9
Stromberg v. California, 283 U. S. 359	5
Williams v. North Carolina, 87 Law. Ed. 189	5

Sections of Constitution Cited:

	PAGE
Article I, Section 1	8
Article I, Section 8	11
Article II, Section 2, 3	11

Statutes Cited:

U. S. Code Annotated, Title 12, Section 95a	2, 3, 4, 8 9, 10, 11, 13
Printed in Appendix 1	13
U. S. Code Annotated, Title 12, Section 95b	10
Section 2 of Act of May 7, 1940, c. 185, 54 Stat. 179	10
U. S. Code Annotated, Title 18, Section 80	2
U. S. Code Annotated, Title 19, Section 1591	2
U. S. Code Annotated, Title 28, Section 347	7

Executive Orders Cited:

Order No. 8405	1, 2, 4, 12
Printed in Appendix 2	14
Order No. 8389	2, 10, 12

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To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit affirming a conviction in the United States District Court for the Southern District of New York.

Statement of the Matter Involved.

Petitioner is a naturalized citizen who came to this country in 1922 (R. 327, 525). Pioneer Import Corporation is a corporation organized by him in 1938 to import goods to this country (R. 346). Petitioner and Pioneer were indicted April 24, 1942, and convicted on August 18, 1942 under a single count charging conspiracy to violate (a) the so-called "Freezing Order" No. 8405 and the statute

upon which said order was based, Section 95(a) of Title 12, U. S. C. A.; (b) Section 80 of the Criminal Code; (c) Section 1591 of Title 19 (Indictment, R. 5-10).

Section 95(a) of Title 12 authorizes the President to "* * * regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange, transfers of credit between or payments by or to banking institutions as defined by the President * * *." Under authority of this statute, the President on May 10, 1940, issued Executive Order 8405 amending a prior order, No. 8389, dated April 10, 1940. As amended, the order prohibited all transactions involving property in which any national of the Netherlands, Belgium and other countries had an interest and all transfers of credit in connection therewith between banking institutions within the United States and between banking institutions within or without the United States. Violation of the order or statute was punishable by $10,000 fine and ten years imprisonment. The statute and order are printed in an appendix herewith.

Section 80 of the Criminal Code makes it a crime punishable by ten years imprisonment and $10,000 fine, to make any false statement, oral or written, in any matter within the jurisdiction of a government agency.

Section 1591 of Title 19, U. S. C. A., is a section of the Tariff Act of 1930, forbidding any false statement upon the entry of merchandise into the United States. Violation is punishable by $5,000 fine and two years imprisonment.

The two latter statutes are not involved in this application, since the question sought to be raised is the constitutionality of Section 95(a) and of the Executive Order issued thereunder.

The government's theory was that diamonds were purchased in Belgium or Holland after May 10, 1940, by

German interests and shipped to the United States from Berlin as German goods and that the conspiracy embraced such plan and contemplated payment therefor in violation of the Executive Order (R. 7-8). The factual issues, though seriously contested, were found against the petitioner (Verdict, R. 735).

Petitioner was sentenced on August 24, 1942 to the maximum fine and imprisonment (two years and $10,000) and has since been serving his sentence (R. 742).

Because of the structure of the indictment, which charged a conspiracy with three different prongs, the indictment was not demurrable unless all three statutes were invalid. The question of constitutionality of Section 95(a) and of the "Freezing Order" were raised at the conclusion of the government's case (R. 321-2) and it was then concluded that the proper method of raising such question was by a request for instructions to the jury at the close of the entire case. At the conclusion of the case, a motion was made (R. 705) to eliminate all evidence relating to this phase of the conspiracy, and denied. A request was then made to instruct the jury as follows (Request No. 7, R. 707):

> "A conspiracy to violate the presidential freezing order would not be a crime because such freezing order is unconstitutional and void and if the jury found that such conspiracy were the only one proven, the defendants must be acquitted."

The Court charged to the contrary (R. 724-5) and granted exception (R. 729).

While the case was substantially tried and submitted to the jury as one involving an alleged conspiracy to violate the Freezing Order, such a request was technically necessary in order to differentiate between conspiracy to violate Section 95(a) and a conspiracy to violate either of the other

two statutes. The government had to prove a conspiracy to violate only one statute. Since violation of three statutes was charged as the object of the conspiracy, conviction could rest on any one. Therefore, if one statute were unconstitutional, the issues should have been restricted to the others, or at least the jury instructed that conviction could not be had on that one. Where a jury is permitted to convict under any one of two or more sections, and any of such sections is unconstitutional, the judgment must be reversed (*Stromberg* v. *California,* 283 U. S. 359; *Williams* v. *North Carolina,* 87 Law. Ed. 189).

The Circuit Court affirmed with an opinion holding Section 95(a) and the Freezing Order constitutional (R. 876). The judgment of affirmance was entered July 30, 1943 (R. 884).

Reasons Relied on for Allowance of the Writ.

The reasons why this writ should be granted are:

1. That the United States Circuit Court of Appeals has decided that Section 95(a) was not an unconstitutional delegation of legislative authority to the President, although it gave the Executive unlimited power to prohibit transactions and prescribed no standard or guide.

2. That the Circuit Court of Appeals has decided that a "retroactive approval" by Congress of an Executive Order, which the President retained complete power to amend, "removed all question of improper delegation", thus approving a reversal of the constitutional process which requires legislation by Congress and approval by the President.

3. That the Circuit Court of Appeals has decided that the power exerted by the Executive in issuing Executive Order 8405 might also be sustained as within the Executive's power to conduct foreign relations.

4. That the decision of the Circuit Court of Appeals is believed to be contrary to the decisions of this Court in *Panama Refining Co.* v. *Ryan,* 293 U. S. 388 and *Schechter* v. *U. S.,* 295 U. S. 495.

5. That the constitutionality of the statute and order involved have not been passed upon by this Court and should be so passed upon because such freezing order, as amended from time to time, has blocked enormous amounts of money and property and made all transactions therein subject to federal license issued only at the discretion of the Executive Department and any transaction in violation of said orders is ostensibly punishable by ten years imprisonment and $10,000 fine.

WHEREFORE the petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court to the Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in this cause, to the end that this cause may be reviewed and determined by this Court, that the judgment of said Circuit Court of Appeals may be reversed, and that the petitioner may have such other and further relief in the premises as may be just.

WERNER VON CLEMM,
Petitioner.

By HAROLD H. CORBIN,
Counsel for Petitioner.